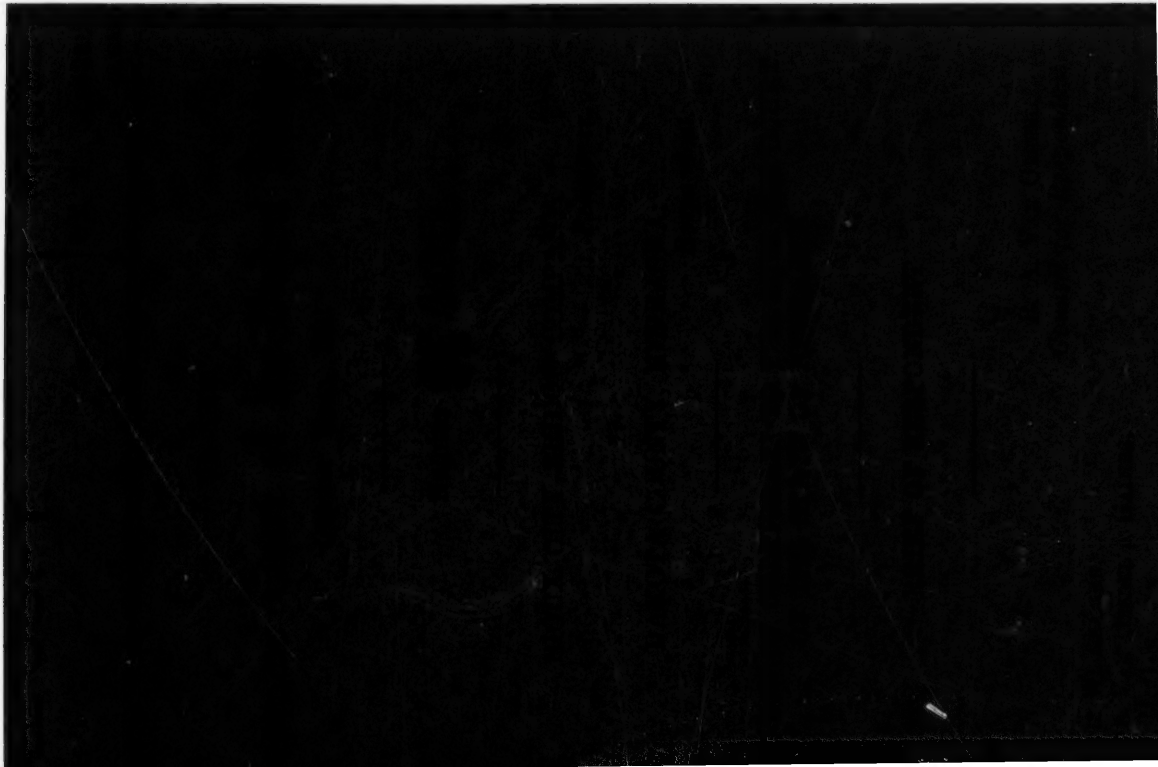

INDEX

LIST OF CASES CITED

IN THE

Supreme Court of the United States

October Term, 1921

Number 361

SIOUX CITY BRIDGE COMPANY,
Petitioner,

vs.

DAKOTA COUNTY, NEBRASKA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF RESPONDENT

STATEMENT OF CASE

This case is here on writ of certiorari to the Supreme Court of Nebraska. Petitioner complains that discrimination has been practiced against it and that thereby it has been denied equal protection of the law and due process of law in violation of the Constitution and Laws of the State of Nebraska, and in violation of the Fourteenth Amendment to the Constitution of the United States.

The Sioux City Bridge Company is a corporation organized under the laws of the State of Iowa, and is the owner of a certain railway bridge located at Sioux City, Iowa,

spaning the Missouri River. A portion of said bridge is in the State of Iowa and a portion in Dakota County, Nebraska. The controversy in this case is the valuation of that portion of the said bridge in Dakota County, Nebraska, for taxing purposes, as well as the question of discrimination which petitioner claims to have been practiced against it.

Section 1, Article 9, Constitution of Nebraska, provides:

"The legislature shall provide such revenue as may be needed by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct * * *."

Section 6300, Revised Statutes Nebraska, 1913, provides:

"All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value, which shall be entered opposite each item and shall be assessed at twenty per cent of such actual value. Such assessed value shall be entered in separate column opposite each item, and shall be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this chapter shall mean its value in the market in the ordinary course of trade."

Section 6364, Revised Statutes of Nebraska, 1913, provides:

"All persons, companies, or corporations owning, controlling, or operating any highway or railway bridge independent of any railway system over any stream or river forming the boundary line between this and any other state, shall be required to list the same for taxation, and the same shall be assessed and taxed at its full true value in money as personal property. In arriving at one-fifth of such value if such bridge is con-

structed over a navigable stream the value of the same to the center of the channel of such stream together with all rights, privileges, and franchises connected therewith or belonging thereto, shall be taken into consideration in ascertaining the true value of such bridge property for taxation; and it shall be the duty of such person or companies or corporations by their president, vice president, managing agent or the superintendent of such bridge, to make out a return to the proper assessor, giving the dimensions of the bridge, in the county where it is located, together with a full statement of its rights, privileges, and franchises, and the same shall be returned by the assessor."

In Dakota County it had been the practice of the County Assessor for many years prior to 1918 to make out a schedule of the bridge property, listing the property as the Sioux City Bridge, fixing the valuation for taxing purposes and sending such schedule to the Bridge Company, or its agent, for signature.

In the spring of 1918 the County Assessor of Dakota County made out such schedule, regarding the property of the Sioux City Bridge Company in Dakota County, placing the value of its property in Dakota County at Six Hundred Thousand Dollars ($600,000.00). Such schedule was forwarded to the taxing official of the Sioux City Bridge Company for signature. The Sioux City Bridge Company refused to sign the schedule on the ground that the valuation was excessive and returned the same to the County Assessor unsigned and requested that the valuation be fixed at a less amount.

The Assessor refused to reduce the valuation and made an entry upon his books that the value of the Sioux City Bridge Company for taxing purposes was $600,000.00. The Sioux City Bridge Company appealed to the Board of Equalization of Dakota County for relief.

In this appeal the tax agent of petitioner appeared before the County Board of Equalization at its annual meeting. The proceedings there held are deducible from the evidence of Mr. Rockwell, County Assessor of Dakota County, acting as witness for the petitioner. He was asked:

Q. Mr. Rockwell, you were present when the Board of Equalization met at each one of their sessions? (B. of Ex., p. 18, Q. 73.)

A. Yes, sir.

Q. Mr. Miller appeared for the Chicago, St. Paul, Minneapolis & Omaha, Railway Company? (B. of Ex., p. 18, Q. 74.)

A. He appeared for the Bridge I think.

Q. For the Bridge Company? (B. of Ex., p. 19, Q. 75.)

A. Yes, sir.

Q. The Sioux City Bridge Company? (B. of Ex., p. 19, Q. 76.)

A. Yes, sir.

Q. What complaint did he make before the Board of Equalization at that time? (B. of Ex., p. 19, Q. 77.)

A. Well, his contention was that the Bridge was assessed too high and he asked that it be reduced $100,00, if I remember correctly, from what it had been assessed at for the years previous to that.

Q. He was before the Board of Equalization on two or three different dates? (B. of Ex., p. 19, Q. 78.)

A. Yes, sir.

Q. And he presented to the Board figures? (B. of Ex., p. 19, Q. 79.)

A. Yes, sir.

Q. And facts? (B. of Ex., p. 19, Q. 80.)

A. Yes, sir.

Q. From his memoranda? (B. of Ex., p. 19, Q. 81.)

A. Yes, sir, he had a memorandum.

On June 18, 1918, the Board of Equalization by its order increased the valuation of that portion of the bridge in Dakota County for taxing purposes to $700,000. The order of the Board of Equalization is set out in the brief of the petitioner.

From this order of the Board of Equalization petitioner perfected an appeal to the District Court of Dakota County as provided by Section 6440, Revised Statutes of Nebraska, 1913.

Issue was joined by Dakota County in the District Court and a trial *de novo* was had. The District Court entered its decree fixing the valuation at $700,000.00. From this decree petitioner appealed to the Supreme Court of Nebraska. The Supreme Court of Nebraska reviewed and affirmed the findings of the District Court of Dakota County. The evidence before the District Court and before the Supreme Court show conclusively that the property of the petitioner had been valued for taxing purposes at its true value and that other property in Dakota County had been universally valued at its true value for taxing purposes.

The Supreme Court of Nebraska held (Syl. 4):

"The evidence held to sustain the assessment of the bridge property."

TO OUR MIND THE QUESTIONS INVOLVED IN THIS CASE ARE TWO QUESTIONS OF FACT, AS FOLLOWS:

I. **What is the true value of the Bridge Property in Dakota County for the year 1918?**

II. **Has there been practiced any discrimination in regard to petitioner's property for the year 1918?**

ARGUMENT

I.

The true value of the bridge property in Dakota County, Nebraska, for taxing purposes for the year 1918 is $700,000.

We refer to the evidence. It shows that the total cost of building the bridge and its approaches was $1,022,355.28 (B. of Ex., p. 33, Ex. 1), and that 73.8 per cent of said bridge lies in Dakota County, Nebraska (B. of Ex., p. 132, Qs. 555 and 556); $754,689.76 is that part of the total cost of building said bridge lying in Dakota County, Nebraska.

H. Rettinghouse, Civil Engineer for the St. Paul, Minneapolis & Omaha Railroad Company, operating company for the Sioux City Bridge Company, testified that the physical condition of the bridge is very good (B. of Ex., p. 83, Q. 279).

F. T. Darrow, Civil Engineer for the Chicago, Burlington & Quincy Railway Company, testified for the Bridge Company that there is very little physical depreciation (B. of Ex., p. 120, Q. 494); that if said bridge were built today it would cost about fifty per cent more (B. of Ex., p. 121, Q. 500).

H. E. Barlow, Assistant Engineer for the Chicago, St. Paul, Minneapolis & Omaha Railway Company, testified for the Bridge Company that to build the bridge on April 1st of this year the figure given by Mr. Darrow is probably reasonably correct, fifty per cent greater than the original cost (B. of Ex., p. 133, Q. 560).

The evidence shows that the Sioux City Bridge Company has this bridge leased to the Chicago, St. Paul, Minneapolis & Omaha Railway Company (B. of Ex., p. 46, Ex. 5, Q. 175), and the Chicago, Burlington & Quincy Railway Com-

pany (B. of Ex., p. 33, Q. 171, Ex. 1), and that these agreements have been extended. Briefly it shows that the two railway companies pay the bridge company $10,000 per annum for depreciation. The evidence further shows that this is the only railway bridge spanning the Missouri River going into Sioux City, Iowa (B. of Ex., p. 122, Q. 510).

Another fact that must be taken into consideration in arriving at the true value of the bridge is its prominence in being the only railroad bridge leading into Sioux City, Iowa, from northeast Nebraska, which makes it much more valuable because it dominates the railroad inlet from northeast Nebraska into Sioux City, Iowa, and the railroad outlet from Sioux City, Iowa, into northeast Nebraska. Another thing that must be taken into consideration is the Act of Congress (B. of Ex., p. 127, Q. 529), which provides that the bridge company may charge rates of toll for transportation over said bridge as may be deemed proper and reasonable. This bridge was a toll bridge up to the middle of the year 1917, and after that it was leased by the railroad companies (B. of Ex., p. 75, Ex. 12½, Q. 236). It will be noted that the income from this bridge, while a toll bridge, was enormous; that in the year ending June 30, 1907, after deducting all expenses, the bridge company made almost 25 per cent on their investment, and for the next three months, as shown by the table, they were making more than 25 per cent on their investment.

Upon the testimony of the witnesses of the petitioner there is little if any physical depreciation of the bridge in question and to construct said bridge today it would cost $1,500,000.00 which today would place the actual valuation of said bridge in Dakota County at $1,110.000. The evidence also shows that the bridge dominates the inlet into Sioux City and that the tolls of the bridge before it was leased show it to be paying 25 per cent on its original cost.

In consideration of these facts the Supreme Court of Nebraska, in its opinion said (Syl. 1):

> "In determining the true value of the bridge under the provisions of Section 6364, Revised Statutes, 1913, for tax purposes, all the elements which go to make up value should be considered. Generally, these are cost of construction, the life of the structure, depreciation, cost of reproduction, net earnings, value of stocks and bonds, and while none of these elements are controlling, each has its proper bearing upon the ultimate question of value."

The Supreme Court further said:

> "That notwithstanding that the bridge may be somewhat obsolescent in the light of present day demands, a fair analysis of the testimony indicates that in the past the owners of the bridge have not only received a fair interest rate upon the investment, but have also received the major part, if not all, of the original amount expended, and are still receiving a fair interest upon the original cost. * * * that upon a consideration of all the elements which go to make up value we are of the view that the finding of the Board of Equalization is not so manifestly wrong that we are justified in disturbing it."

Respondent respectfully submits that from the evidence it firmly believes that the valuation of the bridge for taxing purposes, as fixed by the Board of Equalization, is, if anything, too low.

In this respect and before concluding this point, we wish to direct the court's attention to the holding of the Supreme Court of the State of Iowa in the matter of the *Sioux City Bridge Company vs. Iowa Board of Review,* 184 N. W. 743. In that case the Supreme Court of the State of Iowa affirmed the finding of the District Court assessing the

26% portion of the bridge located in Iowa, for taxing purposes, as of January 1st, 1919, at $330,000.00. Upon this basis Dakota County, Nebraska, would be entitled to a valuation for taxing purposes of approximately $1,000,000.00.

II.

There has not been practiced any discrimination in regard to petitioner's property for the year 1918.

J. P. Rockwell, County Assessor for Dakota County for the year 1918 upon direct examination by counsel for petitioner was asked:

Q. What is the fact as to the value placed by you as assessor upon farm lands in the county as compared to the market value of such lands? (B. of Ex., p. 14, Q. 50.)

A. The law provides that property shall be assessed at its real value, at its market value, and that property is valued by the precinct assessor at its real value, its actual value as far as to their ability to determine, and that is the basis on which the assessment is made, on its actual value.

Q. Well, now, it is true, is it not, that as a matter of common knowledge, and as a fact, that farm lands are generally assessed in the county at only about fifty cents on the dollar? (B. of Ex., p. 14, Q. 53.)

A. No, I do not think they are assessed at fifty per cent of their value.

Q. Have you ever made a study of that, Mr. Rockwell? (B. of Ex., p. 15, Q. 55.)

A. I have looked it up pretty well.

Q. Do you mean to say, Mr. Rockwell, that a farm that is worth $200.00 an acre is assessed at $200.00 an acre for taxing purposes? (B. of Ex., p. 15, Q. 56.)

A. Well, now, here is the proposition in that respect. A farm that is worth $200.00 an acre would be assessed at $200.00 an acre.

Q. It should be? (B. of Ex., p. 15, Q. 57.)

A. But here is the proposition in assessing real estate, its location to the market, its actual value, if put upon the market according to the judgment of the assessor. You may own a quarter section of land out here that you value at $300.00 an acre, and I as a purchaser would not want to pay $150.00 an acre. A willing bidder and willing seller would establish the price of that land. You might own a piece of land that adjoins Mr. Leamer and that Mr. Leamer would want it for some particular purpose, and he would give you more than that land is worth. That is not the true value. It is what the land generally is worth in the community that fixes the price that the assessor goes by in arranging the valuation of that land. For instance. There is land that has been sold in this precinct, the sale value of that land according to the record it sold for $150.00 an acre. The assessed value was $70.00 or $80.00 an acre. Now, we say there is an instance where it is only assessed at fifty per cent of its actual value, but understand that the assessor in assessing that land takes into consideration things that make the value of that land. For instance, it is liable to be damaged by the Missouri River. I know one piece of land in particular that was sold for $100.00 an acre and assessed at $50.00. Now, that sale did not represent the real value of that land, because that land was sold by Mr. Mulhall to some fellow that did not know the Missouri River. The assessor that fixed that value of that land did know the Missouri River, and in six months after this sale was made that land that at that time amounted to about 160 acres, was cut down to less than ten acres by the action of the Missouri River. The assessor took that into consideration. The man who bought it did not know the conditions, and he, of course, lost the money he had in it.

Thomas A. Polley, tax commissioner for several railroads and the Sioux City Bridge Company, was one of the

witnesses for the Bridge Company, and it was attempted to be shown by his evidence that other property in Dakota County, Nebraska, was not assessed at the proper valuation, but upon a perusal of his answers it will be noted that his compilation of figures is very meager, and absolutely unreliable as a basis for decision for any court, and all his evidence is immaterial. His testimony shows that over a period of several years, he took the considerations of certain recorded deeds and compared them with the assessed value, and in that way attempted to show that as a whole in Dakota County, Nebraska, the assessed value was only a little over one-half of the actual value. Mr. Polley took only warranty deeds. He just took deeds that expressed a big consideration and the other deeds that did not look right to him he excluded. He took no court deeds or quit claim deeds (B. of Ex., p. 159, Q. 656), and no deeds on which there may be revenue stamps indicating the consideration to be thousands of dollars. His investigation was very incomplete (B. of Ex., p. 160, Qs. 660-661). He did not take sheriff deeds (B. of Ex., p. 161, Q. 667). Mr. Polley admitted on cross examination that he had a certain ratio, and any deeds that showed any variation lower or above this ratio he did not consider (B. of Ex., p. 161, Q. 666). He was asked:

Q. Do you take referee's sales in Nebraska? (B. of Ex., p. 161, Q. 668.)

A. Yes, sir, I take as many of those as we can get. Occasionally one is eliminated, for the reason that the ratio between the assessment and the stated price is apparently very abnormal at times.

Q. Anything that don't look right you eliminate it and do not consider it? (B. of Ex., p. 62, Q. 669.)

A. It may not look right to me at all, but if the ratio is somewhere within reaching distance of the standard that prevails in that communit we leave it in, but if it is abnormal we do not leave it in.

Q. But to arrive at this ratio by taking all these deeds together, the figuring out of the value of those, and then the value of what the assessor * * * (B. of Ex., p. 162, Q. 670.)

A. You will find that a great number of transactions —that the great majority of transactions come pretty close to a certain standard, parcel by parcel.

Then Mr. Polley attempted to show that South Sioux City, Nebraska, where the bridge is located, was far below other towns in the state in regard to the assessment of personal property, and he devised a ratio of a certain number of families in South Sioux City, Nebraska, compared to the value of the property they turned in to the assessor as compared with a like number of families in other cities of the same population to the value of property they turned in. This method is absolutely unreliable and should not be followed, for Mr. Polley admits on cross examination that South Sioux City, Nebraska, contains a great number of poor people, which is the tendency with a town close to a big city (B. of Ex., p. 164, Q. 686). The inaccuracy and the unreliability in this kind of a method of determining that the assessed value of the property is lower than the actual value is very apparent because communities vary so much, and with South Sioux City, which is a peculiar town because it contains a great number of poor people, the ratio system would be absolutely unreliable and maliciously misleading.

J. P. Rockwell, count assessor for Dakota County, Nebraska, testified and showed that in 1918 they assessed hogs at $14.00 per hundred pounds (B. of Ex., p. 208, Q. 792), and that they placed different values on cattle, and that the different values on cattle were: yearlings from $25.00 to $35.00; two year olds from $35.00 to $45.00; and the three year olds from $45.00 to $55.00; cows from $60.00

to $75.00; fat cattle ten cents per pound flat (B. of Ex., p. 208, Q. 794). Mr. Rockwell said that the values were based on what the market was at that time (B. of Ex., p. 208, Q. 794). Corn was $1.25 per bushel (B. of Ex., p. 208, Q. 797); that the value of wheat was $2.00 per bushel (B. of Ex., p. 208, Q. 798); that no reduction was made on any of the money turned in (B. of Ex., p. 208, Q. 799), and that all personal property was assessed at its actual value (B. of Ex., p. 211, Q. 812).

Mr. Rockwell's evidence shows conclusively that all property, both personal and real, for the year 1918 was assessed at its true value.

In the light of the foregoing facts as adduced from the testimony of petitioner's own witnesses it is conclusively shown that all property, both personal and real, for the year 1918, in Dakota County, Nebraska, was assessed at its true value.

LAW

The Supreme Court of the State of Nebraska has held:

> "That the finding of a Board of Equalization must be so manifestly wrong that reasonable minds could not differ thereon before this Court will disturb them."
>
> *Woods vs. Lincoln Gas & Electric Co.*, 74 Neb. 526, 104 N. W. 931.

Respondent contends that this is a correct statement of the law of this state and as such is binding upon the Federal Courts. Respondent further contends that while there may have been some little deviation from the true value of taxable property in Dakota County for the year 1918, that there has been no such discrimination as is complained of by petitioner.

"Perfect equality in the assessment of taxes is unattainable—approximation to it is all that can be had."

Bigelow, Chief Justice, in *Commonwealth vs. Savings Bank*, 5 Ala. 428.

"Perfect equal taxation will remain an unattainable good, as long as laws and government and men are imperfect."

Sharswood, J., in *Grimes vs. School District*, 57 Pa. St. 433.

"Equality can never be but approximation."

Redfield J., in *Allen vs. Drew*, 44 Vt. 174.

Petitioner's position is untenable and unsupported by the decisions cited, for the reason that it assumes a false hypothesis, in that the facts fail to disclose intentional assessment at a higher rate and a denial of the equal protection of the laws. For the petitioner to take the position that he has been denied equal protection of law is for him to beg the question, and to assume as true that which is directly and conclusively controverted by the facts as adduced from the evidence in this case.

Respondent assumes this position for the following reasons:

1. Mr. Thomas A. Polley is unqualified as an expert to fix values of real and personal property in Dakota County, Nebraska, for the reasons that he is wholly unfamiliar with local conditions and his theory of the valuation by the ratio process is purely speculative and without foundation in law.

2. Mr. Rockwell shows that he arrived at the valuation for assessment purposes by a fair and impartial method. His assessment of personal property, especially farm products, was fixed as the market value thereof and his real

estate values were established upon the basis of what a willing purchaser would pay to a willing seller.

3. *The Court in Louisville & N. R. Co. vs. Brownell, 220 Fed. 191, Syl. 4, states:*

> *"Constitutional Law—Equal Protection of the Law—Equality of Taxation.—Where the constitution of a state requires the equal taxation of all property the enactment by the Legislature of laws, or the action of executive officers in enforcing them, which in either case results in the intentional assessment or taxation of one class of property at a higher rate than another class is a denial of the equal protection of the law in violation of the Fourteenth Amendment."*

The above case is relied upon by petitioner and the respondent contends that it properly states the law. For the protection afforded by this statement of the law to be extended to the petitioner he must have availed himself of a proper showing regarding the discrimination he alleges to have been practiced. Respondent contends that no such discrimination has been shown to have been practiced in regard to the petitioner. There is no proof, either by inference or by direction, to show discrimination in this matter, nor are there any facts that justify a conclusion so unreasonable in its nature. Neither the acts of the assessor in assessing the property nor the finding of the Board of Equalization of Dakota County, nor the finding of the District Court of Dakota County, nor the review of the Supreme Court of the State of Nebraska, justify any such false conclusion as is contended for by the petitioner.

IN CONCLUSION

We believe that were the petitioner aggrieved that the Fourteenth Amendment to the Federal Constitution would

xtend to it, its protection in this case; but the respondent respectfully submits that the petitioner has not been aggrieved in any manner or form so as to have recourse to aid under the provisions of this Amendment to the Constitution.

Respectfully submitted,

R. A. VAN ORSDEL,
Counsel for Respondent.

GEORGE H. LEHMER,
GAINES, VAN ORSDEL & GAINES,
J. W. MCGAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1922.

Sioux City Bridge Company, vs. Dakota County, Nebraska, } On Writ of Certiorari to the Supreme Court of Nebraska.

[January 2, 1923.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case is here by writ of certiorari to the Supreme Court of Nebraska. The question is whether the taxing authorities of the State of Nebraska and of Dakota County in assessing taxes against the plaintiff in error, the Sioux City Bridge Company, upon that part of its bridge across the Missouri River at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment.

For a number of years before 1918, the Bridge Company had returned the Nebraska part of the bridge for taxation at $600,000. In that year the assessor of Dakota County sent the blank return to the Bridge Company as usual, but the Bridge Company sent back the proposed return, refusing to sign, and insisting that the valuation was too high. The assessor then returned the bridge at $600,000 as formerly. The Bridge Company appealed to the Board of Equalization of the county. Only the counsel for the Bridge Company and for the city of South Sioux City appeared. No witnesses were called and no evidence produced, but the Board of Equalization, on the appeal of the Bridge Company for reduction, raised the assessment above that of the assessor one hundred thousand dollars. From this ruling an appeal was taken to the District Court of Dakota County for relief against the action of the Board of Equalization on the ground that the valuation was excessive, was without evidence and arbitrary, that it violated the constitution of the State requiring a uniformity of taxing burdens,

and that it deprived the Bridge Company of due process and equal protection of the law as forbidden by the Fourteenth Amendment.

Seventy-four per cent. of the total value of the bridge is in Dakota County, Nebraska, and twenty-six per cent. is in Iowa. The original cost of the bridge was $941,000, but some wooden trestles in the original construction were taken out and steel substituted and this increased the original cost to $1,022,000. The bridge was built in 1888. Since 1907 it has been under lease to two railroads and jointly they maintain the bridge, pay the taxes and 8 per cent. on the original cost of $945,800. The leases are short-time leases because the bridge while in good repair is too light for modern traffic and can only be used under burdensome and expensive restrictions. One of the railroad companies has made soundings for a new bridge. The engineers report the existing bridge to be totally out of date and estimate a depreciation in its value on this account of $300,000 from its original cost. The same witnesses testified that to build the bridge just as it was would cost at present prices from $1,300,000 to $1,500,000, but that it would be most foolish to build a bridge of that old type now.

A tax commissioner of one of the lessee railroads, with long experience in taxation and valuation, testified that from an examination of the sales of real estate as shown by deeds of record in Nebraska and in Dakota County and the tax list, the acre property in Dakota County was assessed at 55.70 per cent. of its value, that improvements in city property were assessed at 49.29 per cent of their selling value, and had been so assessed for seven years. The county assessor thought such sales were not best evidence of true value in money and denied that there was any attempt to value at less than such value.

The District Court held the reasonable value of the bridge in Nebraska to be more than $700,000 as assessed and dismissed the appeal. It made no finding upon the issue as to whether there was an undervaluation of other real estate and improvements in Dakota County or the State and did not refer to it.

The Bridge Company carried the case on appeal to the Supreme Court. That court found from the evidence that $700,000 as the true value was not so manifestly wrong that it was justified in disturbing the assessment.

Taking up the objection that the real property and improvements were undervalued in Dakota County, the court said:

"It is finally urged that this Court should reduce the true value of the bridge as found by the Court to 55 per cent of such value, for the reason that other property in the district is assessed at 55 per cent of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent of its value.

While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this Court that when property is assessed at its true value and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. Lincoln Telephone and Telegraph Company *v.* Johnson County, 102 Nebraska, 254. In the argument of appellant the soundness of this ruling is assailed and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case."

Section 1, Article 9, of the Constitution of Nebraska, contains the following:

"The legislature shall provide such revenue as may be needed by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct. . . ."

Section 6300 of the Revised Statutes of Nebraska provides:

"All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at 20 per cent of such actual value. Such assessed value shall be entered in separate column opposite each item and shall be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this chapter shall mean its value in the market in the ordinary course of trade."

In the case of *Sunday Lake Iron Company* v. *Wakefield*, 247 U. S. 350, 352, 353, this Court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execu-

tion through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Raymond *v.* Chicago Union Traction Company, 207 U. S. 20, 35, 37." Analogous cases are *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516, 517, 518; *Cummins* v. *National Bank*, 101 U. S. 153, 160; *Taylor* v. *Louisville & N. R. Co.*, 88 Fed. 350, 364, 365, 372, 374; *L. & N. Ry. Co.* v. *Bosworth*, 209 Fed. 380, 452; *Washington Water Power Company* v. *Kootenai County*, 270 Fed. 369, 374.

The charge made by the Bridge Company in this case was that the State, through its duly constituted agents, to wit, the county assessor and the County Board of Equalization, improperly executed the constitution and taxing laws of the State and intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and all the other real estate and its improvements in the county at 55 per cent.

The Supreme Court does not make it clear whether it thinks the discrimination charged was proved or not, but assuming the discrimination, it holds that the Bridge Company has no remedy except "to have the property assessed below its true value raised rather than to have property assessed at its true value reduced." The dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent. of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor* v. *Louisville & Nashville R. Co.*, 88 Fed. Rep. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this Court in *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516, 517, 518. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly im-

possible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment.

But we construe the action of the court not to be equivalent to a finding that such intentional discrimination existed between the valuation of the Bridge Company's property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100 per cent. valuation of its property. It was on the same principle, doubtless, that the District Court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this Court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Company* v. *Wakefield*, 247 U. S. 350, 353.

The judgment of the Supreme Court of Nebraska is reversed and is remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.